INTERIOR BOARD OF INDIAN APPEALS

John W. Rosenfield and Margaret J. Oswald v. Portland Area Director,
Bureau of Indian Affairs

30 IBIA 204 (02/24/1997)

Related Board case:
31 IBIA 57

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JOHN W. ROSENFIELD and MARGARET J. OSWALD, Appellants	:	Order Vacating Decision and Remanding Case
v.	:	Docket No. IBIA 96-57-A
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	February 24, 1997

This is an appeal from a February 16, 1996, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming an increase in rent for a homesite and recreation lease on the Tulalip Reservation. For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further consideration.

Appellants are lessees under Lease 8207 91-01, dated October 14, 1991, and approved by the Superintendent, Puget Sound Agency, BIA, on August 29, 1995. The lease covers "Lot 59 Block 1 Hermosa Point Summer Homesites, within Gov't lot 1, Sec. 28, T. 30 N., R. 4 E., WM Snohomish Co., WA containing .15 acres, more or less" 1/ and is for a 10-year term beginning October 14, 1991, with rental set at "$2920.00 per annum Subject to Prov. 7 of the lease."

Provision 7 of the lease states:

> **RENTAL ADJUSTMENT**.))The rental provisions in all leases which are granted for a term of more than five years and which are not based primarily on percentages of income produced by the land shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with the regulations in 25 C.F.R. 162. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by this contract or the contribution value of such improvements.

In connection with the five-year rental review for appellants' lease, BIA prepared an appraisal in November 1995. The appraiser employed two appraisal methodologies: a sales comparison methodology, in which he

1/ There is a house on Lot 59, which appellants evidently purchased from the previous lessee.

analyzed sales of comparable properties to determine a market value and applied an 8 percent rate of return; and a rental comparison methodology, in which he compared rents for properties occupied by manufactured homes or mobile homes. By the sales comparison methodology, the appraiser estimated annual rental for Lot 59 to be $5,260. By the rental comparison methodology, he estimated annual rental to be $7,060. Because he found the rental information for waterfront properties very limited, he gave greater consideration to the sales comparison methodology and found the fair annual rental to be $5,260.

By letter of November 29, 1995, the Superintendent informed appellants that their rent would be increased to $5,260 per year as of October 1, 1996.

Appellants appealed the notice of rental increase to the Area Director, making a number of arguments. In his February 16, 1996, decision, the Area Director rejected those arguments and found that appellants had failed to show any error in the rental adjustment.

On appeal to the Board, appellants ask the Board to consider the arguments they made before the Area Director, as well as the arguments included in their filings with the Board.

Appellants' principal contentions are related to the fact that Lot 59, which is on a bluff facing Tulalip Bay, is subject to erosion and has decreased in size during the time appellants have leased the property. Stating that they are retired and on fixed incomes, appellants suggest that, given the problems they have had and will continue to have as a result of erosion, it is unfair to expect them also to pay increased rent.

Appellants indicate that they were unaware of the erosion problem until after they had entered into their lease and moved onto the property. Their lease, however, has a specific provision relating to erosion:

> 22\ It is understood and agreed that the Lessee is advised that no guarantee of their safety can be made and never has been made due to the erosion problem of homesites along the cliff areas. The Lessee chooses to lease this property and holds the lessors harmless in the event the cliff goes and the lessee with it. The Lessee acknowledges that the risk is entirely the Lessee's risk. The Lessor has no control over the erosion as it is controlled by the storms and water action in the bay.

This provision clearly put appellants on notice of the erosion problem.

Appellants contend, however, that, as a result of erosion, "there is over 2000 sq. feet of property we don't have the use of but is shown to be leased be us." Statement of Reasons at 2.

Lot 59 clearly appears to have decreased in size since 1991, apparently continuing a trend which began some time earlier. A plat prepared in 1959 shows the lot to be 46.9 feet wide, 144 feet deep on one side, and 176 feet

deep on the other side. 2/ Assuming an average depth of 160 feet, the lot would have contained approximately 7,504 square feet in 1959. The 1991 lease states that the lot contained .15 acres, more or less, a figure which equates to approximately 6,534 square feet. In 1993, a BIA appraiser measured the lot and found it to have an average depth of 119 feet. 3/ If the 1993 square footage is calculated using the 1959 width of 46.9 feet, the result is 5,581.1 square feet. If the November 1995 square footage is calculated using a width of 46.9 feet and the appraiser's estimate of 113 feet of depth, the result is 5,299.7 square feet. Based on these figures, most of which are estimates, the loss between 1991 and 1995 is approximately 1,234.3 square feet. It appears likely that appellants' estimate of a loss of 2,000 square feet was based upon the 1959 plat rather than the 1991 lease.

Although the lot has decreased in size since 1991, appellant's rental adjustment was based upon the appraisal prepared in November 1995, which employed, or should have employed (see discussion on page 208), the November 1995 measurements in order to determine fair rental value as of that date. BIA clearly did not base the rental adjustment on the 1991 measurements of Lot 59, as appellants seem to suggest.

Appellants next contend that the BIA appraiser who measured the property in 1993 indicated at that time that lessees in the area would probably "get some relief" as a result of the erosion losses. Statement of Reasons at 2. The record contains a statement from the appraiser. She denies having stated that the remeasurement would provide "some relief" to the lessees. She states that, "[o]n the contrary, [she] was quite open about the fact that the rise in property values throughout the area would likely be reflected in the new lot valuations." Jan. 31, 1996, Statement of Staff Appraiser Jenness R. Ellett. On appeal to the Board, appellants dispute the appraiser's statement. They believe that their recollection of the conversation was accurate. Further, they contend that there was no mention of an increase in property values during the conversation.

Clearly there is a factual dispute with respect to the 1993 conversation. However, the Board need not resolve that dispute here. Even if the appraiser made the statement appellants claim she did, and even if that statement were construed as a commitment concerning appellants' rental

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2/ This plat is entitled "Replat of Assessor's Plat, Hermosa Point Summer Homes Sites, Tulalip Bay, Washington." It was approved by the Chairman, Board of County Commissioners, Snohomish County, Washington, on Feb. 4, 1959, and was recorded on the same date.

3/ The record includes a handwritten note signed by the BIA appraiser who prepared the 1995 appraisal. The note states: "In 1993 Jenness [Ellett, another BIA appraiser] measured the lot to have an average depth of 119'.
I used an average depth of 113' to compensate for any additional erosion since then."
There is nothing in the record which shows the width measurement made in 1993. See further discussion on page 208.

adjustment, BIA would not be precluded from adjusting appellant's rental in accordance with the terms of their lease and the regulations in 25 C.F.R. Part 162. The appraiser would have had no authority to commit BIA to limit appellant's rental increase to an amount below fair rental value. It is well established that the Federal Government is not bound by erroneous or ultra vires representations made by its employees and it is also established that such representations do not grant rights not authorized by law. DuBray v. Acting Aberdeen Area Director, 30 IBIA 64 (1996), and cases cited therein.

Appellants also contend that similar lots in the vicinity are being leased for one-third to one-half the amount of their new rent. The Area Director noted that appellants had not provided any evidence of lower rents on other lots. He also stated: "Since [BIA] adjusts rental rates only once every five years, it is possible that the other lots have not yet had their rental adjustments and so their rates do not reflect the current market rates." Area Director's Decision at 3.

Appellants have still not identified any other lots with lower rents or provided any further information concerning them. Appellants' bare allegation of inequity in rents is insufficient to prove that rents in the area are in fact inequitable.

Appellants also contend that their rental increase is much higher than is justified by increases in the Consumer Price Index. BIA typically bases rental adjustments upon increases in fair market value of land and/or land rental values in the area in which the lease is located. The fact that the increase in land and rental values in the area of the Tulalip Reservation is greater than the increase in the national Consumer Price Index does not mean that BIA erred in employing the more specific measure to determine fair rental value for Lot 59.

Appellants next contend that the appraiser erred in appraising Lot 59 as a waterfront lot. They contend: "Lot 59 is a view lot. It is not a waterfront lot. There is no way normal we can get to the water from our lot." Notice of Appeal at 1.

The section of the BIA rental adjustment memorandum entitled "Property Description" states in part: "Waterfront: Yes, medium bank with access to waterfront." Appellants submit a number of photographs, including photographs of the bluff at the edge of Lot 59. In the photographs, the bluff appears to be quite steep, although it does not appear to be 100 feet in height, as estimated by appellants. Statement of Reasons at 1. Given the evident steepness of the incline, however, it seems unlikely that the average person would find the water accessible from Lot 59.

It is possible, of course, that the appraiser did not mean that the water is directly accessible from Lot 59. However, this is the sense conveyed by the quoted description. If the appraiser valued Lot 59 as if it had direct access to the water, and if it does not actually have such Discussion and Conclusions-

rect access, the valuation may be too high. 4/ Thus, the Board finds that it must remand this case for clarification in this regard. Upon remand, the Area Director shall determine whether Lot 59 was valued as if it had direct access to the water and, if so, whether it should have been.

Because it finds that this case must be remanded, the Board also addresses two other aspects of the rental adjustment memorandum which were not specifically challenged by appellants but which appear to the Board to require clarification and which might affect the valuation of Lot 59. 5/

First, the rental adjustment memorandum employs a width measurement of 50 feet for Lot 59 but cites no authority for that measurement and, in fact, incorporates a tract map (evidently based on the 1959 plat discussed above) which shows the lot to be 46.9 feet wide. Thus, as far as the record shows, the appraiser used a width of 50 feet to make his calculation of fair market value even though the actual width of the lot is only 46.9 feet. 6/

If Lot 59 is really only 46.9 feet wide, a substantial overvaluation has occurred as a result of the method used by the appraiser to calculate fair market value under the sales comparison methodology. He determined a value per "front foot," i.e., width, through an analysis of the comparables. He then multiplied this value, $1,250 per front foot, by 50, resulting in a figure of $62,500, to which he added $3,200 (representing the value of the sewer system) to arrive at a fair market value of $65,700 and, ultimately, a fair annual rental of $5,260. If the lot is only 46.9 feet wide, the fair market value, calculated in the same way, would be $61,825 and the fair annual rental $4,946. Thus, a difference of 3.1 feet in width results in a difference of $3,875 in fair market value and a difference of $314 in fair annual rental.

Upon remand, the Area Director shall determine whether or not the appraiser's width measurement is based upon an actual measurement and, if not, shall recalculate fair market value and fair annual rental using the actual width measurement.

4/ "Waterfront" was one of five factors by which Lot 59 was compared to other properties. The record does not include detailed descriptions of the comparables. It is therefore not possible to tell whether they have access to the water or even whether access to the water was a measured component of the "waterfront" factor.

The other four compared factors were: Date of sale, size, access, and location.

5/ An appellant bears the burden of showing error in the Area Director's decision. Therefore, the Board ordinarily does not address matters not raised by the appellant. In this case, however, the Area Director must revisit his decision to address the concern just discussed. The Board therefore exercises its authority under 43 C.F.R. 4.318 to require that he also address these additional issues.

6/ It is possible that the 50-foot width figure derived from BIA's 1993 measurement of Lot 59. However, as noted above, there is nothing in the record showing the 1993 width measurement.

The Board's second concern is whether the likelihood of further erosion of Lot 59 is a factor which should be, or was in this case, taken into consideration in comparing it to other properties. Although the compared factors, as described, do not appear to include this consideration, it is possible that it is subsumed in one of them. The Board claims no professional expertise in appraisal. However, from a lay perspective, it seems possible that a tract for which erosion is a known problem would have a lower sales value than an otherwise similar tract which did not have an erosion problem.

Accordingly, upon remand, the Area Director shall determine whether or not the likelihood of further erosion on Lot 59 was taken into consideration in the appraisal and shall explain why it is, or is not, appropriate to take this factor into consideration in determining fair annual rental.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, the Area Director's February 16, 1996, decision is vacated, and this matter is remanded to him. The Area Director shall issue a new decision, taking the three concerns discussed above into consideration.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge